

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

IN RE:

JAMES MORRIS RUDNICK,

Debtor.

CASE NO.: 20-40124-KKS
CHAPTER 7

SC ADVISORS 7, LLC,

Plaintiff,

ADV. NO.: 20-04013-KKS

v.

JAMES MORRIS RUDNICK,

Defendant.

ORDER GRANTING
DEBTOR'S [SIC] MOTION TO DISMISS AMENDED ADVERSARY
COMPLAINT AND OBJECTION TO ENTRY OF DISCHARGE
PURSUANT TO 11 U.S.C. §§ 727(a) AND 727(c)
(DOC. 15)

THIS MATTER is before the Court on the *Debtor's [sic] Motion to Dismiss Amended Adversary Complaint and Objection to Entry of Discharge Pursuant to 11 U.S.C. §§ 727(a) and 727(c)* ("Motion to Dismiss," Doc. 15), and Plaintiff's Response in opposition.¹ Prior to the

¹ *Response in Opposition to Debtor's Motion to Dismiss Amended Adversary Complaint and Objection to Entry of Discharge Pursuant to 11 U.S.C. §§ 727(a) and 727(c)*, Doc. 21 ("Response").

scheduled hearing on the Motion to Dismiss the parties agreed to mediate the issues raised in this adversary proceeding so the Court continued the hearing.² The Court issues this ruling to define for the parties, their counsel, and any prospective mediator the posture of this Adversary Proceeding from the Court's perspective, and to provide all, Plaintiff in particular, a better understanding of what may be required to pursue its claims.

For the reasons set forth below, the Motion to Dismiss is due to be granted.

PROCEDURAL HISTORY

Plaintiff filed its original Complaint commencing this adversary proceeding on September 23, 2020.³ Defendant moved to dismiss the original Complaint on November 5, 2020.⁴ After the Court granted Plaintiff additional time within which to file a response, Plaintiff filed an

² *Agreed Motion to Continue Hearing on Motion to Dismiss Amended Adversary Complaint and Objection to Entry of Discharge Pursuant to 11 U.S.C. §§ 727(a) and 727(c)*, Doc. 22; *Order Granting Agreed Motion to Continue Hearing on Motion to Dismiss Amended Adversary Complaint and Objection to Entry of Discharge Pursuant to 11 U.S.C. §§ 727(a) and 727(c)* (Adv. No. 22) [*sic*], Doc. 23.

³ *Adversary Complaint and Objection to Entry of Discharge Pursuant to 11 U.S.C. §§ 727(a) and 727(c)*, Doc. 1 ("Complaint").

⁴ *Debtor's Motion to Dismiss Adversary Complaint and Objection to Entry of Discharge Pursuant to 11 U.S.C. §§ 727(a) and 727(c)*, Doc. 10.

Amended Complaint rather than a response to Defendant's original motion to dismiss.⁵ The instant Motion to Dismiss followed.

The Court has spent many hours parsing through the myriad allegations contained in the sixty (60) page, 300-paragraph Amended Complaint to determine what facts may go with what causes of action. Having done so unsuccessfully, the Court has determined that the appropriate thing to do is grant the Motion to Dismiss and allow Plaintiff an opportunity to file a new amended complaint clearly setting forth the relief it seeks, other than as to a portion of the Amended Complaint being dismissed with prejudice.

FACTUAL BACKGROUND⁶

Plaintiff, SC Advisors 7, LLC ("SC Advisors" or "Plaintiff"), is a North Carolina limited liability company founded in 2009. Throughout its business dealings with Defendant, SC Advisors was a two-person business that performed consulting services for local businesses. Defendant, James Rudnick ("Rudnick" or "Defendant"), is an individual

⁵ *Amended Adversary Complaint and Objection to Entry of Discharge Pursuant to 11 U.S.C. §§ 727(a) and 727(c)*, Doc. 13 ("Amended Complaint").

⁶ Unless otherwise specified, the facts recited here derive from the Amended Complaint. Pursuant to the standard for review of a motion to dismiss the Court takes these facts as true for purposes of this ruling.

who resides in Leon County, Florida. Defendant is President of Rudnick Development, Inc. and owns interests in a variety of other corporate entities and limited liability companies, including Rudnick Development, LLC, a Florida limited liability company.

Rudnick has been involved in commercial real estate for over thirty (30) years; his business entities have been engaged in buying, selling, renovating, and developing commercial real estate. Over a span of approximately eight (8) years, SC Advisors made loans to entities owned or controlled by Rudnick, or in which he had an ownership interest ("Rudnick Entities"). According to SC Advisors, Rudnick managed these real estate projects, some of which are generally referred to by the parties as: Gateway, Panama City Courthouse, Mary A., Rialto, Southeast Lot, Echelon, and Moteng. The details of loans made by SC Advisors to Rudnick Entities are not set forth in the Amended Complaint.

At some point, the business relationship between SC Advisors and Rudnick soured. In late 2019, after SC Advisors had discussed repayment with Rudnick on multiple occasions over a span of more than a year, SC Advisors filed suit against Rudnick in the District Court for the Western District of North Carolina seeking a judgment for damages in excess of

\$5 million based on of Rudnick's personal guarantees of a variety of loans to the Rudnick Entities.⁷

Rudnick filed a voluntary Chapter 7 Petition with this Court on March 23, 2020.⁸ In his original bankruptcy schedules Rudnick listed over \$109 million in unsecured claims, including a claim of SC Advisors in the amount of \$4,825,000.00.⁹ In his Amended Schedules E/F, Rudnick reduced the total of his unsecured debt to \$17,810,000 and the claim of SC Advisors to \$2.1 million.¹⁰

DISCUSSION

SC Advisors timely filed its original Complaint commencing this adversary proceeding on September 23, 2020; it is now proceeding on its Amended Complaint. In the Amended Complaint, SC Advisors sets forth factual allegations in 147 paragraphs, and then purports to articulate seventeen (17) causes of action for, among other things, denial of Rudnick's discharge, nondischargeability of Rudnick's debt to SC Advisors, and a money judgment for breach of contract, breach of fiduciary duty, actual and constructive fraud, and unfair and deceptive

⁷ Proof of Claim 57-1 at 31, *In re Rudnick*, No. 20-40124 (Bankr. N.D. Fla. July 27, 2020).

⁸ *Chapter 7 Voluntary Petition, In re Rudnick*, No. 20-40124, Doc. 1.

⁹ *Schedule E/F, In re Rudnick*, No. 20-40124, Doc. 28.

¹⁰ *Amended Schedule E/F, In re Rudnick*, No. 20-40124, Doc. 48.

trade practices under North Carolina law. SC Advisors also seeks a preliminary injunction to prevent Rudnick from using funds and assets belonging to the Rudnick Entities that Plaintiff claims are under his direct or indirect control to pay his or his family's expenses. In the final section of the Amended Complaint, SC Advisors sets forth the specific relief it seeks, including a judgment for actual, treble, and punitive damages. Rudnick moves to dismiss the Amended Complaint on several grounds.

Motion to Dismiss Standard

In addressing a motion to dismiss, the Court must accept the factual allegations in the Amended Complaint as true, and take them in the light most favorable to the claimant.¹¹ To survive a motion to dismiss, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹² This standard “requires more than labels and conclusions”¹³ “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements,

¹¹ *Erickson v. Pardus*, 551 U.S. 89 (2007); *Carlson Corp./Southeast v. Sch. Bd.*, 778 F. Supp. 518, 519 (M.D. Fla. 1991) (citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974)).

¹² Fed. R. Civ. P. 8(a)(2), applicable by Fed. R. Bankr. P. 7008.

¹³ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted).

do not suffice.”¹⁴ To determine whether to grant or deny a motion to dismiss, the Court should assume the veracity of well-pleaded facts “and then determine whether they plausibly give rise to an entitlement to relief.”¹⁵ At the motion to dismiss stage, the question before the Court is not what Plaintiff could ultimately prove, but “whether [Plaintiff] has adequately alleged each element of a plausible claim.”¹⁶

The Amended Complaint is rife with shotgun pleading and due to be dismissed for that reason.

The Amended Complaint does not meet basic, minimal pleading standards. It does not contain a statement of a claim that is either short or plain. It is also based on shotgun pleading, which this Court and the Eleventh Circuit have held is improper.¹⁷ In the Amended Complaint, Plaintiff “repeats and realleges” all facts in paragraphs 1–147 into each of the seventeen (17) “causes of action,” without explanation as to which facts are material or germane to each. At the end of the Amended

¹⁴ *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

¹⁵ *Jonsson v. Stinson (In re Stinson)*, Ch. 7 Case No. 18-40628-KKS, Adv. No. 19-04006-KKS, 2019 WL 3282972, at *1 (Bankr. N.D. Fla. June 18, 2019) (quoting *Iqbal*, 556 U.S. at 679).

¹⁶ *All. Shippers, Inc. v. Choez (In re Choez)*, Ch. 7 Case No. 15-45404-ess, Adv. No. 1-16-01015-ess, 2016 WL 3244861, at *22 (Bankr. E.D.N.Y. June 3, 2016); accord *Iqbal*, 556 U.S. at 679; *TDMA, LLC v. Moulton (In re Moulton)*, Ch. 7 Case No. 19-30103-KKS, Adv. No. 19-03011-KKS, 2019 WL 9406132, at *2 (Bankr. N.D. Fla. Dec. 31, 2019).

¹⁷ *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1294–96 (11th Cir. 2018); *In re Moulton*, 2019 WL 9406132, at *6–9; *In re Stinson*, 2019 WL 3282972, at *3–4; *Se. Funding Partners, LLLP v. Williams (In re Williams)*, Ch. 7 Case No. 17-10190-KKS, Adv. No. 18-01002-KKS, 2018 WL 7575597, at *7–8 (Bankr. N.D. Fla. Dec. 17, 2018).

Complaint, Plaintiff finally attempts to define what relief it is requesting. This type of pleading is improper.¹⁸

The Amended Complaint is “a hodgepodge of broad accusations of wrongdoing and factual allegations and causes of action with little relevance to” claims either under 11 U.S.C. §§ 523 or 727.¹⁹ Plaintiff makes no effort to connect the Amended Complaint’s multiple collective factual allegations to the elements of each of its claims for relief; rather, Plaintiff unnecessarily leaves Defendant and the Court to decipher this jumble of facts, law, and claims.²⁰ This type of shotgun pleading contravenes the notice pleading standard under Fed. R. Civ. P. 8, applicable by Fed. R. Bankr. P. 7008.²¹

In certain sections of the Amended Complaint, Plaintiff pleads more than one claim for relief in the same place.²² This type of pleading is also improper under the rules of civil and bankruptcy procedure.

¹⁸ Cases cited *supra* note 17.

¹⁹ *Ingram v. Nelson (In re Nelson)*, Ch. 7 Case No. 13-27789, Adv. No. 13-2478, 2014 WL 1347031, at *5 (Bankr. D. Utah Apr. 4, 2014).

²⁰ Certain of SC Advisors’ allegations appear completely contradictory. For example, at one point SC Advisors alleges that “Capitol Capital Irrevocable Trust is not registered with the Florida Secretary of State” Amended Complaint ¶ 41.h, Doc. 13. But later in the same paragraph SC Advisors alleges that the same entity’s address is listed in Florida Secretary of State records. *Id.* ¶ 41.j.

²¹ *Hart v. Salois*, 605 F. App’x 694, 701 (10th Cir. 2015).

²² The “First Cause of Action” seeks relief under §§ 727(a)(2)(A) and (a)(2)(B) and the “Fifth Cause of Action” seeks relief under §§ 523(a)(2)(A) and (a)(2)(B). Amended Complaint at 34, 41, Doc. 13.

Bankruptcy Rule 7010(b), which incorporates Fed. R. Civ. P. 10(b), provides, in pertinent part:

A party must state its claims . . . in numbered paragraphs, each limited as far as practicable to a single set of circumstances. . . . If doing so would promote clarity, each claim founded on a separate transaction or occurrence . . . must be stated in a separate count.²³

It is practicable for SC Advisors to state each of its claims in paragraphs that are limited to a single set of circumstances; doing so would unquestionably promote clarity. Moreover, a “complaint that fails to separate causes of action or claims for relief into separate counts is a ‘shotgun’ pleading violating Fed. R. Civ. P 10(b).”²⁴

Certain “causes of action” in the Amended Complaint fail to allege claims on which relief can be granted and are due to be dismissed on those grounds.

In addition to containing improper shotgun pleading, some “causes of action” are due to be dismissed for other, more specific reasons. For example, SC Advisors alleges claims predicated on “fraud-based

²³ Fed. R. Civ. P. 10(b), applicable by Fed. R. Bankr. P. 7010.

²⁴ *White v. White (In re White)*, Ch. 7 Case No. 20-12251-SAH, Adv. No. 20-01061-SAH, 2021 Bankr. LEXIS 309, at *14 (Bankr. W.D. Okla., Feb. 8, 2021) (citing *Mayo v. Jackson (In re Jackson)*, Ch. 7 Case No. 20-50811, Adv. No. 20-5030, 2020 WL 7634502, at *4 (Bankr. E.D. Ky. 2020); *Elliott v. Piazza (In re Piazza)*, Ch. 7 Case No. 5-18-bk-02300 RNO, Adv. No. 5-18-ap-00101 RNO, 2019 WL 1084203, at *5 (Bankr. M.D. Pa. 2019) (“Separate claims for non-dischargeability should be pled in separate counts.”)).

breaches of personal guaranties”²⁵ A guaranty is a contract. If a party fails to abide by a contract, the customary cause of action is for breach of contract. Plaintiff fails to explain the basis or existence of any recognized cause of action for “fraud-based” breach of contract.

Plaintiff’s First Cause of Action fails to state a cause of action under either 11 U.S.C. § 727(a)(2)(A) or § 727(a)(2)(B).

Shotgun pleading aside, the First Cause of Action fails to state a viable claim. Here, SC Advisors alleges that post-petition Rudnick “continues to conceal and transfer” property of Rudnick Development, so his discharge should be denied pursuant to 11 U.S.C. §§ 727(a)(2)(A) and (B).²⁶ SC Advisors bases this claim on its conclusion that the Rudnick Entities are alter egos of Rudnick, and their assets now belong to the bankruptcy estate.²⁷ But in order to reach such a conclusion, the Court must first rule that Rudnick and the Rudnick Entities are alter egos of each other. Until and unless it does, the assets belonging to the Rudnick Entities are not assets of the bankruptcy estate.

Section 727(a)(2) applies only to “assets *already* included as

²⁵ Amended Complaint ¶ 1, Doc. 13.

²⁶ *Id.* ¶ 147.

²⁷ *Id.* ¶ 153.

property of the estate.”²⁸ An individual shareholder does not own a corporation’s assets even if the shareholder owns 100% of the corporation.²⁹ Thus, Rudnick’s bankruptcy estate does not include assets owned by the Rudnick Entities, and Rudnick’s transfer of corporate assets, if any, cannot result in denial of his discharge under § 727(a)(2).³⁰ Section 727(a)(2) does not apply to “*hypothetical* assets creditors later may bring into the estate under fraudulent transfer or alter ego theories.”³¹

**The Third Cause of Action fails to state a claim under
11 U.S.C. § 727(a)(4)(A).**

In the Third Cause of Action, SC Advisors alleges that Rudnick’s discharge should be denied because Rudnick “knowingly and fraudulently made a false oath or account.”³² As proof, SC Advisors alleges that Rudnick omitted his actual debt to SC Advisors from his bankruptcy petition and amended schedules. This is not true; Rudnick listed SC Advisors in his original and amended schedules, albeit in a

²⁸ *Synovus Bank v. Patel (In re Patel)*, Ch. 7 Case No. 6:18-bk-00036-KSJ, Adv. No. 6:18-ap-00029-KSJ, 2019 WL 10734051, at *3 (Bankr. M.D. Fla. 2019).

²⁹ *Gebhardt v. Ellis (In re McKeever)*, 550 B.R. 623, 635 (Bankr. N.D. Ga. 2016).

³⁰ *Id.* at 636–37; *Trivedi v. Levine (In re Levine)*, No. 14 B 10740, Adv. No. 14 A 00461, 2014 WL 7187007, at *5 (Bankr. N.D. Ill. Dec. 16, 2014).

³¹ *Ellis*, 550 B.R. at 635; *accord Trivedi*, 2014 WL 7187007, at *5.

³² 11 U.S.C. § 727(a)(4)(A) (2020).

lower amount in the latter.³³

As additional factual support for the Third Cause of Action, SC Advisors alleges, “upon information and belief,” that Rudnick falsely testified that he did not use Rudnick Development, LLC funds for personal or family debts or omitted facts necessary to reveal the truth. “Generally, allegations of fraud based on information and belief do not satisfy Rule 9(b)'s heightened standard of pleading” but such allegations may be acceptable if “accompanied by a statement of facts upon which the belief is founded.”³⁴ SC Advisors does not set forth facts supporting its belief that Rudnick gave such false testimony.

As further support for the Third Cause of Action SC Advisors complains that Rudnick did not list the Rudnick Entities in his Schedules as his alter egos. As one bankruptcy court has held based on similar allegations, expecting a debtor to extrapolate all potential alter ego claims and list every asset he potentially could be deemed to own through future legal challenges would, essentially, require the debtor to be

³³ *Schedules at 35, In re Rudnick*, No. 20-40124, Doc. 28; *Amended Schedules/Statements at 35, In re Rudnick*, No. 20-40124, Doc. 48.

³⁴ *Mukamal v. BMO Harris Bank (In re Palm Beach Fin. Partners)*, 488 B.R. 758, 767 (Bankr. S.D. Fla. 2013).

clairvoyant.³⁵ Further, it is illogical to assume that any debtor would willingly list his or her incorporated businesses as alter egos on bankruptcy schedules.

Finally, as basis for denial of discharge in the Third Cause of Action, SC Advisors alleges that Rudnick failed to report payments made by Rudnick Development for his personal expenses on his tax returns.³⁶ Even assuming this to be true, such a statement was not made “in or in connection with the [bankruptcy] case”³⁷

The Fourth Cause of Action is time-barred, so it must be dismissed.

As Defendant argues, the Fourth Cause of Action is time-barred. “The amendment of a pleading relates back to the date of the original pleading only when ‘the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.’”³⁸ This cause of action was not raised in the original Complaint, does not relate back to the facts alleged in the original Complaint, and was filed after the bar date for

³⁵ *In re Patel*, 2019 WL 10734051, at *4.

³⁶ Amended Complaint ¶¶ 176, 178–80, 183, Doc. 13.

³⁷ 11 U.S.C. § 727(a)(4).

³⁸ *Barley v. Paletti (In re Paletti)*, Ch. 7 Case No. 06-10209-LMK, Adv. No. 07-01001-LMK, 2008 WL 1745561, at *2 (Bankr. N.D. Fla. Jan. 9, 2008) (quoting Fed. R. Civ. P. 15(c)(2)).

objections to discharge pursuant to Fed. R. Bankr. P. 4004(a), which ran on September 26, 2020, well before SC Advisors filed the Amended Complaint.³⁹ For that reason, the Fourth Cause of Action is due to be dismissed, with prejudice.

The Fifth Cause of Action fails to state a claim for nondischargeability under 11 U.S.C. §§ 523(a)(2)(A) & (B).

In paragraph 38 of its Amended Complaint, SC Advisors alleges that “[n]otwithstanding Mr. Rudnick’s oral and written promises,” there were not sufficient assets to pay the debt due to SC Advisors.⁴⁰ Nowhere in the Amended Complaint does SC Advisors assert what oral or written promises Rudnick made. More importantly, SC Advisors fails to connect the dots between any such promises and 11 U.S.C. §§ 523(a)(2)(A) and (B), the operative portions of which state:

(a) A discharge . . . does not discharge an individual debtor from any debt . . .

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition;

(B) use of a statement in writing—

(i) that is materially false;

³⁹ Fed. R. Bankr. P. 4004(a); *Order Granting SC Advisors, 7 LLC’s Motion to Extend Time to Object to Debtor’s Discharge or to Challenge Whether Certain Debts are Dischargeable (ECF No. 67)*, *In re Rudnick*, No. 20-40124, Doc. 70.

⁴⁰ Amended Complaint ¶ 38, Doc. 13.

- (ii) respecting the debtor's or an insider's financial condition;
- (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
- (iv) that the debtor caused to be made or published with intent to deceive⁴¹

The only discernable facts alleged in the Amended Complaint that relate to § 727(a)(2)(A) in the Fifth Cause of Action are that Rudnick made oral representations about his or the Rudnick Entities' financial conditions; a claim Congress clearly excluded from this Code section.

Also, as to its cause of action under § 523(a)(2)(A), SC Advisors alternately refers to itself as a lender to and "investor" in the Rudnick Entities.⁴² But the only debt to which the Amended Complaint refers is based on Rudnick's personal guarantees of loans to Rudnick Entities. If SC Advisors invested in certain Rudnick Entities, it alleges no legal basis to hold that an investor's unpaid investment, or capital, is a "debt" that may be nondischargeable in bankruptcy.

As to its cause of action under § 523(a)(2)(B), the only written representation referenced in the Amended Complaint is a letter dated October 25, 2019. This letter paints a dire, as opposed to rosy or

⁴¹ 11 U.S.C. § 523(a)(2)(A) & (B) (2020).

⁴² *Id.* ¶¶ 39, 69, 76, 157, 192.

optimistic, picture of Rudnick's and some Rudnick Entities' then financial conditions:

My short-term liquidity condition is critical. . . . I no longer have the ability to make interest payments. . . . Three of the [Rudnick] entities involved are no longer operating and have no funds available to make payments Your only remaining recourse is against me, as personal guarantor.⁴³

This letter appears to be a true, as opposed to false, fraudulent, or materially misleading written statement respecting Rudnick's and some Rudnick Entities' financial conditions.

SC Advisors' claims that Rudnick promised its loans would be secured by certain properties fail to sufficiently allege causes of action under either § 523(a)(2)(A) or § 523(a)(2)(B); SC Advisors does not allege that such promises were made with false pretenses, false representations, or actual fraud. Under the Federal Rules of Civil Procedure, fraud must be pled with particularity.⁴⁴ The Fifth Cause of Action of the Amended Complaint does not rise to the pleading level required.

Finally, SC Advisors also alleges that it extended the maturity date

⁴³ Amended Complaint, Ex. C, Doc. 13-3. Rudnick concludes the letter by stating that judgments totaling millions of dollars have been entered against him, and that he has "financial difficulties." *Id.*

⁴⁴ Fed. R. Civ. P. 9(b), applicable by Fed. R. Bankr. P. 7009(b).

of various loans and refrained from collection efforts in reliance on Rudnick's promises that the loans were secured by various properties and assets. Here, two essential elements of fraud are missing: 1) that Rudnick made the representations knowing they were false at the time they were made; and 2) that SC Advisors reasonably relied on the representations.⁴⁵ It is perhaps intuitive why SC Advisors fails to allege any fact as to its reasonable reliance on such representations: no such facts may exist. Normally, all a party must do to determine whether its loans are secured is review the loan documents and official records.

Unless SC Advisors can allege different facts in support of the Fifth Cause of Action, it seems unlikely that its causes of action under §§ 523(a)(2)(A) or 523(a)(2)(B), even if properly alleged, can survive a renewed motion to dismiss.

The Sixth Cause of Action fails to state a claim for larceny or embezzlement under 11 U.S.C. § 523(a)(4).

In the Sixth Cause of Action, SC Advisors cites 11 U.S.C. § 523(a)(4). Under that provision, a debtor will not be discharged from any debt "for fraud or defalcation while acting in a fiduciary capacity,

⁴⁵ See *First Nat'l Bank Alaska v. Shelley (In re Shelley)*, No. 03-42947-PNS, Adv. No. 04-03007N, 2005 WL 2456925, at *3 (Bankr. N.D. Fla. Apr. 28, 2005).

embezzlement, or larceny”

The elements of embezzlement are: “1) entrustment 2) of property 3) of another 4) that is misappropriated.”⁴⁶ At least one element of embezzlement is absent from the Amended Complaint. Assuming all allegations of the Amended Complaint to be true, SC Advisors either loaned money to or invested money in Rudnick Entities. Neither a loan nor an investment is the entrustment of “property of another.”⁴⁷

Similarly, the Sixth Cause of Action does not state a claim for larceny under § 523(a)(4). “Larceny is the taking of property without the owner’s consent, but without force or violence [E]mbezzled property is originally obtained in a lawful manner, while in larceny, the property is unlawfully obtained.”⁴⁸ SC Advisors does not allege that Rudnick took its property without its consent or unlawfully; rather, it alleges that it voluntarily loaned or invested funds in Rudnick Entities. Even if SC Advisors can ultimately prove that it did so based on false representations, its version of the facts does not support a claim for larceny against Rudnick.

⁴⁶ *In re Stinson*, 2019 WL 3282972, at *3.

⁴⁷ *See Tavadia Enters. v. Mitchell (In re Mitchell)*, 618 B.R. 199, 210 (Bankr. W.D. Ky. 2020).

⁴⁸ *In re Stinson*, 2019 WL 3282972, at *3 (quoting *Tulsa Spine Hosp., LLC v. Tucker (In re Tucker)*, 346 B.R. 844, 852 (Bankr. E.D. Okla. 2006)) (internal quotation marks omitted).

The Thirteenth Cause of Action fails to state a claim for breach of fiduciary duty.

Pursuant to Florida law, “the elements of a claim for breach of a fiduciary duty are: the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff’s damages.”⁴⁹ Although a fiduciary relationship may be implied in law, “evidence that one party placed trust or confidence in the other party does not create a fiduciary relationship in the absence of ‘some recognition, acceptance or undertaking of the duties of a fiduciary on the part of the other party.’”⁵⁰ Although SC Advisors contends that Rudnick breached the trust and confidence it had placed in him, it does not allege that Rudnick ever accepted or undertook the duties of a fiduciary. A plaintiff like SC Advisors must allege both that it “placed trust in the defendant” and “the defendant accepted that trust.”⁵¹ An arms-length transaction does not establish a fiduciary relationship.⁵²

⁴⁹ *Hogan v. Provident Life & Acc. Ins. Co.*, 665 F. Supp. 2d. 1273, 1286 (M.D. Fla. 2009) (citing *Gracy v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002)).

⁵⁰ *Secs. Inv. Prot. Corp. v. Capital City Bank (In re Meridian Asset Mgmt.)*, 296 B.R. 243, 262 (Bankr. N.D. Fla. 2003) (citing *Lanz v. Resolution Trust Corp.*, 764 F. Supp. 176, 179 (S.D. Fla. 1991)).

⁵¹ *Hogan*, 665 F. Supp. 2d. at 1287.

⁵² *Id.* (citing *Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp.*, 850 So. 2d 536, 541 (Fla. 5th DCA 2003)).

The Seventeenth Cause of Action fails to adequately state a claim for a Preliminary Injunction.

In the Seventeenth Cause of Action, SC Advisors requests a preliminary injunction against Rudnick to prevent him from using funds or assets of one or more Rudnick Entities. A party seeking a preliminary injunction must demonstrate that (1) there is a substantial likelihood of success on the merits; (2) the party will suffer irreparable harm without the injunction; (3) the harm to the party outweighs the injury the injunction would inflict on the other party; and (4) the injunction would not be adverse to the public interest.⁵³ A preliminary injunction may not issue when there is simply no likelihood of success on the merits.⁵⁴ Moreover, “[t]he power of the bankruptcy court to grant injunctive relief extends only to the property of the Debtor's estate, for the purpose of protection and fair distribution of estate assets.”⁵⁵

SC Advisors has not shown, nor has this Court ruled, that assets of the Rudnick Entities are property of Rudnick’s bankruptcy estate. By way of the Seventeenth Cause of Action, SC Advisors is seeking a

⁵³ *Angram Bus. Servs. v. City of Waterbury (In re Angram Bus. Servs.)*, 250 B.R. 144, 146 (Bankr. S.D. Fla. 2000).

⁵⁴ *Tujague v. Castro Family Trust, LLC (In re Landash Corp.)*, 590 B.R. 797, 801 (Bankr. S.D. Ohio 2018).

⁵⁵ *In re Angram Bus. Servs.*, 250 B.R. at 146.

preliminary injunction against a non-debtor third party or parties—one or more of the Rudnick Entities—not named as a defendant in this action. The Court can grant no such relief.

Even were the Rudnick Entities defendants in this adversary proceeding, it is doubtful that SC Advisors has standing to request the type of preliminary injunction it seeks. In *In re C.D. Jones & Co.*, the issue before this Court was whether certain claims and causes of action brought by a creditor in state court constituted property of the debtor's bankruptcy estate.⁵⁶ This Court concluded, as have others, that “an alter ego action is Section 541 property of the estate if the claim is common to all creditors . . .”⁵⁷ and “[i]f the claims and causes of action . . . are, in reality, fraudulent transfer claims that would have been available to creditors pre-petition, . . . the right to recover any such fraudulent transfers is property of the bankruptcy estate.”⁵⁸ If the Rudnick Entities are Defendant's alter egos, and if Defendant is using their assets or money for his own purposes, any action to prevent him from doing so or to recover such assets belongs to the Chapter 7 Trustee, because the

⁵⁶ *In re C.D. Jones & Co.*, 482 B.R. 449, 451 (Bankr. N.D. Fla. 2012).

⁵⁷ *Id.* at 455.

⁵⁸ *Id.* at 456; *see also In re Landash Corp.*, 590 B.R. at 801–02.

harm is to all creditors, not just SC Advisors.⁵⁹

For the reasons stated, it is

ORDERED:

1. The Motion to Dismiss is GRANTED, without prejudice, as to the First through Third and Fifth through Sixteenth Causes of Action.
2. The Motion to Dismiss is GRANTED, with prejudice, as to the Fourth and Seventeenth Causes of Action.
3. If Plaintiff files a further amended complaint and does not cure the shotgun pleading issues, this adversary proceeding may be dismissed with prejudice.
4. Plaintiff shall have twenty-one (21) days from the conclusion of mediation within which to file and serve an amended complaint as to the First through Third and Fifth through

⁵⁹ *Venn v. Venetian Antiques & Interiors, Corp. (In re AAA Bronze Statues & Antiques, Inc.)*, 598 B.R. 27, 29 (Bankr. N.D. Fla. 2019) (citing *In re Icarus Holding, LLC*, 391 F.3d 1315, 1321 (11th Cir. 2004), and *Daake v. C.D. Jones & Co. (In re CD Jones & Co.)*, Ch. 7 Case No. 09-31595-KKS, Adv. No. 15-03002-KKS, 2015 WL 2260707, at *1, *4 (Bankr. N.D. Fla. May 12, 2015) (citing *In re Xenerga, Inc.*, 449 B.R. 594, 598–99 (Bankr. M.D. Fla. 2011))); *see also Spence v. Hintze*, 570 B.R. 369, 387 (Bankr. N.D. Fla. 2017) (“Where a trustee . . . is asserting an alter ego claim that is common to all creditors and allowed by state law, such a claim is proper, even in the case of individual, as opposed to corporate, debtors.”), *aff’d sub nom., Hintze v. Spence*, No. 1:17cv18-MCR/GRJ (N.D. Fla. Mar. 26, 2018), *aff’d*, 739 F. App’x 579 (11th Cir. 2018).

Sixteenth Causes of Action.

5. Defendants shall have fourteen (14) days from Plaintiff's service of an amended complaint within which to file a responsive pleading.
6. The hearing on the Motion to Dismiss, currently scheduled for May 18, 2021, is CANCELED.

DONE and ORDERED on March 3, 2021.


KAREN K. SPECIE
Chief U.S. Bankruptcy Judge

Defendant's counsel is directed to serve a copy of this Order on interested parties and file Proof of Service within three (3) days of entry of this Order.